BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

JOSHUA W. LANGKIET	)	
Claimant	)	
V.	)	
	)	
LAYNE CHRISTENSEN CO.	)	Docket No. 1,059,778
Respondent	)	
AND	)	
	)	
OLD REPUBLIC INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

Respondent and insurance carrier (respondent), through Douglas C. Hobbs, requested review of Administrative Law Judge Ali Marchant's March 4, 2016 Award. Phillip B. Slape appeared for claimant. The Board heard oral argument on June 17, 2016.

ISSUE

Claimant injured his low back while working on January 11, 2012. He had lumbar fusion surgery on April 2, 2014. The judge concluded claimant's accident was the prevailing factor in his need for surgery and claimant's surgery was reasonably necessary to cure and relieve the effects of his injury. Claimant was awarded permanent partial disability (PPD) benefits based on a 20% functional impairment and a 66.25% work disability. The judge concluded there was insufficient evidence to establish claimant abandoned his job or that respondent terminated his employment for cause.

Respondent argues claimant's surgery was unnecessary. Respondent asserts once the impairment for the unnecessary surgery is disregarded, the average of the relevant functional impairment ratings does not exceed 7.5%, such that claimant does not meet the statutory threshold for a work disability award. Contending claimant abandoned his job or was terminated for cause, respondent asserts he cannot get PPD benefits in excess of the value of a 7.5% functional impairment.

Claimant argues the Board should affirm the judge's findings regarding functional impairment and work disability.

The only appealed issue concerns the nature and extent of claimant's disability, including: (1) whether his disability is based on his lumbar fusion or (2) whether he abandoned his job or his employment was terminated for cause.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the Award's stipulations. At oral argument, the parties stipulated that if claimant's lumbar fusion was reasonably necessary to cure and relieve the effects of his injury by accident, the judge properly calculated claimant having a 66.25% work disability. The parties agreed the Board could consult the AMA *Guides*[1] (hereafter *Guides*) in determining this appeal. Claimant stated, for the purpose of this appeal, that he was not currently pursuing permanent total disability benefits or benefits based on psychological impairment. Based on such statements, the Board will limit findings of fact regarding claimant's employability, his wage loss or task loss, permanent total disability or psychological impairment.

FINDINGS OF FACT

We address the facts in two sections: (1) claimant's injury by accident, his medical treatment and evaluations and (2) his separation of employment.

Claimant's injury by accident, medical treatment and psychological evaluations

Claimant, currently 37 years old, began working for respondent on July 20, 2011, as an operator/CDL. On January 11, 2012, claimant was working during a windy day in Lawton, Oklahoma. Claimant was standing on a raised, metal platform. A gust of wind started to blow his hard hat off. As claimant reached for his hat, he fell about four to six feet to the ground, landing on the right side of his back. Claimant had immediate pain throughout his entire body. He crawled to a metal trailer, where he rested for about 20 minutes before the work day ended. Claimant had significant pain all night, but was unable to reach his supervisors to get permission to obtain medical treatment.

The next morning, claimant told his supervisor he needed to go to the hospital. Claimant's supervisor drove him to Via Christi Occupational & Environmental Medicine in Wichita. There, Jon P. Kirkpatrick, D.O., recorded claimant as having a right lateral chest contusion and injury to his ribs, but no loss of consciousness from his fall.

Claimant also treated at Via Christi Hospital in Wichita on January 16, 2012. Among other complaints, claimant had right flank, rib, low back and thoracic area pain, in addition to reporting loss of consciousness from his accident. Claimant had an unremarkable CT scan of his lumbar spine and was prescribed Lortab, Mobic and Flexeril. Claimant returned to Via Christi Occupational & Environmental Medicine on January 23, 2012, and later received medical treatment from John Estivo, D.O., who placed him on light duty and ordered a lumbar spine MRI.

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[1] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based on the fourth edition of the *Guides*.

Claimant continued to work for respondent picking up trash, vacuuming the shop and detailing vehicles. He testified he re-injured himself on February 8, 2012, while lifting a bucket of water. He went to the emergency room and was told he had a cracked rib. Although he continued to work, claimant testified he was not able to work a full day because of throbbing and burning in his legs and a sharp pain in his back.

Claimant had lumbar MRI scans on February 15, 2012, and April 10, 2012. The radiologist's interpretation of the initial MRI report is not properly in evidence. The second MRI showed claimant had mild degenerative disk disease that was unchanged from the prior study with no new area of spinal stenosis or nerve encroachment.

Claimant underwent a court-ordered independent medical evaluation with Paul Stein, M.D., a board-certified neurosurgeon, on June 5, 2012. Like all medical experts who testified in this case, Dr. Stein obtained a history, performed a physical examination and reviewed at least some of claimant's medical records. Claimant complained of low back pain radiating into his right leg. Claimant walked very slowly, as if in great pain, and had a marked right-sided limp, walking in a somewhat forward bent manner.

Claimant had no lumbar spasm, but diffuse tenderness. He had markedly restricted lumbar range of motion. Straight leg raising testing was negative when claimant sat, but positive at 30° when claimant laid down. Dr. Stein noted such test should be positive in both positions for a patient with nerve root irritation. Patrick-Fabere test was negative. With respect to his right leg, claimant had no atrophy or definitive dermatomal sensory deficit. He had normal reflexes, but exhibited very little leg strength. Dr. Stein suspected claimant was not validly representing his right leg strength.

Dr. Stein reviewed the two aforementioned MRIs and interpreted them as showing dessication of claimant's L4-5 and L5-S1 disks, a posterior annular tear at L4-5 with central bulging, but no definitive nerve root impingement and either a mild central and right protrusion or herniation at L5-S1 with probable nerve encroachment.

Dr. Stein noted claimant had preexisting degenerative disk disease at L4-5 and L5-S1, in addition to some disk herniation to the right at L5-S1 which he believed may have occurred at the time of claimant's work accident, but he could not so conclude with absolute certainly. Dr. Stein stated, "This disk protrusion is consistent with some right lower extremity symptomatology. Because of these factors, [I] believe it is more likely than not that the prevailing factor in his current symptomatology is the incident at work in January."[2] Claimant was taken off work and Dr. Stein recommended a series of right L5-S1 epidural steroid injections (ESIs) for diagnostic and therapeutic purposes. Based upon his belief claimant exhibited signs of symptom magnification and malingering, Dr. Stein also recommended psychological testing.

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[2] Stein Depo., Ex. 1 at 19, see also p. 12.

At respondent's request, Daniel Lane, a licensed private investigator, took surveillance video of claimant between June 5 and June 8, 2012. The video showed claimant arriving at and leaving his appointment with Dr. Stein, during which time he had an obvious limp. Video taken on June 8, 2012, showed claimant walking around a grocery store and loading items, including a case of water, into the back of a vehicle. Claimant did not appear to be limping in the June 8, 2012 video.

On June 21, 2012, claimant saw John Dickerson, M.D., a board-certified neurosurgeon, at the referral of his primary care physician. Claimant complained of excruciating low back and right leg pain. Dr. Dickerson's examination revealed lumbar tenderness on palpation, positive straight-leg raising test on the right and a positive Patrick-Fabere test at the right side of the sacroiliac joint. Dr. Dickerson noted claimant was limping and unable to walk on his toes or heels. Dr. Dickerson reported the April 10, 2012 MRI showed a herniated disk on the right at L5-S1 compressing the S1 nerve root and severe lateral recess stenosis at L4-5. Dr. Dickerson diagnosed claimant with a disk herniation at L5-S1, lumbar radiculopathy and stenosis at L4-5. Dr. Dickerson recommended a right-sided L4-5 laminotomy and a right L5-S1 microdiskectomy.

As part of a July 9, 2012 Order, Dr. Stein was made claimant's authorized treating physician. On July 12, 2012, Dr. Stein issued a supplemental report stating:

> A conference was held today with attorney Douglas Hobbs. I saw a surveillance video dated 6/18/12, three days after my office visit with the patient. The video also showed the patient entering and exiting my office on June 5th. In the surveillance, he is walking without apparent limp or pain and walking at a normal pace. He is in a grocery store picking out items and carrying them. Afterward, he is seen putting the items in the back of a vehicle, particularly lifting a case of bottled water which I was informed weighed approximately 18 pounds.
>
> The patient's behavior on the surveillance is much different than that which he manifested in the office. Note that in my report of 6/5/12 I indicated the presence of likely symptom magnification. The video is more documentation in that regard.
>
> I still believe we should proceed with the epidural injections noted in my report. However, any further treatment would have to be based on purely objective findings and a psychological evaluation might be necessary. Additionally, I believe that Mr. Langkiet may return to work with the following temporary restrictions[:] 1. No lifting more than 20 pounds very occasionally, 10 pounds more often. 2. Avoid frequently repetitive bending and twisting of the lower back more than 30 degrees. 3. Have the opportunity to alternate sitting with standing and/or walking at least on an hourly basis.[3]

[3] *Id.*, Ex. 1 at 11.

Claimant returned to Dr. Stein on July 31, 2012, after having one ESI. Claimant complained of intractable and intolerable pain from the buttocks all the way up to the shoulder blades and down the right lower extremity with equal amounts of back and leg pain. Claimant reported numbness and throbbing in his entire body. Dr. Stein noted claimant's complaints were more widespread than the L4-5 and L5-S1 pathology would suggest. Dr. Stein opted not to proceed with a second ESI and took claimant off work. Dr. Stein recommended an EMG/NCT of the lumbar paraspinal muscles and right lower extremity, a lumbar diskogram and an evaluation by a psychologist, T. A. Moeller, Ph.D. On August 7, 2012, Dr. Stein released claimant to sedentary work with no lifting more than 10 pounds, no repetitive lifting and to alternate sitting, standing and working as needed.

On August 13, 2012, claimant underwent the EMG/NCT recommended by Dr. Stein which was interpreted as negative. One week later, claimant underwent the lumbar diskogram recommended by Dr. Stein, which came back as indefinite because it did not show a specific disk caused claimant's pain.

On September 12, 2012, claimant saw Dr. Moeller, who reviewed records and administered a series of standardized psychological tests. Dr. Moeller diagnosed claimant with malingering and recommended any further consideration for surgery should be based on objective findings. As a *caveat*, Dr. Moeller's report further stated:

> However, it is also necessary to remember that somewhat irreverent, if true dictum, "Even malingerers can be genuinely ill." Considering that truth, it is necessary to explore the motive behind his malingering.
>
> During the interview process, Mr. Langkiet was consistent in demonstrating nonverbal pain behaviors I believe are genuine. His gait was impaired. He ambulated with use of a right-handed, single point cane.
>
> When asked, he readily admitted he did not always use the cane. He also admitted the cane had not been prescribed by any health care professional but had been purchased for him by family members about two weeks ago.
>
> It is also true this right-handed cane is used with questionable appropriateness for pain experienced in the right leg and side.
>
> However, his posture and facial expressions throughout the interview were consistent with what appeared to be genuine nonverbal pain behaviors.
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> Additionally, the results of the Pain Patient Profile (P3) are more likely the result of a genuine pain patient attempting to emphasize his symptoms and distress to his care providers as opposed to a conscious attempt to deceive.[4]

[4] Moeller Depo., Ex. 2 at 3-4.

Dr. Moeller stated that rather than attempting to deceive, claimant's over-reporting of his symptoms represented more of his need for intervention and was a "cry for help."[5]

On September 15, 2012, Dr. Stein placed claimant at maximum medical improvement. Dr. Stein did not comment on Dr. Moeller's statement that claimant's pain appeared to be genuine. Using the *Guides*, Dr. Stein found claimant's accident caused him to have a 5% whole body functional impairment due to muscular or soft tissue injury, but he explained that he could have given claimant a 0% rating. Dr. Stein gave claimant no permanent restrictions. Dr. Stein testified that when he last evaluated claimant, no additional treatment was warranted, noting surgery would absolutely provide no benefit. Rather, the doctor testified surgery would only make claimant worse.

Claimant requested a change of physician from Dr. Stein. Pursuant to an August 29, 2013 Order, Patrick Do, M.D., a board-certified orthopedic surgeon, was appointed by the court to address whether claimant required additional medical treatment. Dr. Do saw claimant on November 4, 2013. Claimant's low back was diffusely tender and he had positive straight leg raise testing on the right. Dr. Do stated claimant's lumbar MRI showed annular tearing consistent with his injury, with nerve compression along the right S1 lateral recess. The doctor's impression was "Lower back pain with right leg radicular symptoms."[6] Dr. Do agreed with Dr. Dickerson's recommendation for lumbar spine surgery.

In a January 7, 2014 Order, the court authorized Dr. Dickerson to be claimant's authorized physician, including to perform surgery.

On February 5, 2014, claimant underwent an MRI of the lumbar spine which was interpreted by a radiologist as showing degenerative disk disease at L4-5 and L5-S1, a very small annular tear at L4-5, and a small to medium sized posterolateral disc bulging at L5-S1, with no significant change from the April 10, 2012 MRI.

Claimant returned to Dr. Dickerson on February 13, 2014, complaining of severe mechanical back pain. Dr. Dickerson interpreted the February 5, 2014 MRI as showing continued deterioration of the L4-5 and L5-S1 disks "with herniations at both of these levels"[7] and central and lateral recess stenosis. The doctor noted claimant's condition had "definitely progressed since our last evaluation and . . . he has a severe component of mechanical back pain now . . . ."[8] Dr. Dickerson recommended a two-level lumbar fusion and took claimant off work pending surgery.

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[5] *Id*., Ex. 2 at 4.

[6] Do report (filed Nov. 14, 2013) at 2.

[7] Dickerson Depo., Ex. 2 at 39.

[8] *Id*., Ex. 2 at 39.

On April 2, 2014, Dr. Dickerson operated on claimant, performing a surgical fusion at L4-5 and L5-S1 with laminectomies, foraminotomies and microdiscectomies at those levels. The pre-surgical history and physical noted claimant had a limp and an L5-S1 radiculopathy, right greater than left. According to the doctor, he observed during surgery that claimant had severe spinal stenosis and herniations at L4-5 and L5-S1. Dr. Dickerson testified claimant's fall was the prevailing factor in his condition and need for surgery.

Dr. Dickerson's April 17, 2014 report noted claimant still had back pain, but no leg pain and his right leg numbness and tingling had resolved. Claimant testified his surgery helped his right leg symptoms and he walks better than before surgery, but he had left leg symptoms after his surgery. On May 15, 2014, Dr. Dickerson stated claimant had improved dramatically after surgery, but claimant's biggest concern was a burning sensation in his left anterior thigh, similar to a bee sting or a sunburn. Dr. Dickerson did not think claimant's left leg symptoms were due to his surgery because the symptoms came about just 10 days earlier, rather than closer to the time of surgery.

Claimant called Dr. Dickerson's office on May 30, 2014, reporting a burning sensation in his left thigh and using a cane to walk. On July 31, 2014, Dr. Dickerson stated claimant no longer had leg or foot pain, but had non-radicular thigh pain, presumably involving his left leg. The doctor noted claimant reported markedly improved back pain.

Dr. Dickerson testified his surgical finding of severe stenosis explained claimant's radiating leg pain and some of his back pain. The doctor opined claimant's accident triggered his disk herniation and began the deterioration that resulted in the fusion. Dr. Dickerson admitted there were no objective findings of radiculopathy. He discounted the negative EMG/NCT and stated he usually diagnoses radiculopathy based on clinical examination. Dr. Dickerson admitted the radiologists interpreting the MRIs did not opine claimant had a herniated disk, which was one of the diagnostic criteria he used for performing surgery, or anything other than borderline stenosis. However, Dr. Dickerson indicated the February 2014 MRI showed focal disk bulging which is what he characterized as a herniated disk. The doctor also testified it was not unusual for MRI studies to fail to reveal severe stenosis because a patient undergoing an MRI is on his or her back, opening up the spinal curve, whereas people undergoing surgery have the spinal curve compressed.

Dr. Dickerson testified claimant was "quite a bit better" at their initial visit after surgery and the surgery successfully alleviated claimant's right leg pain.[9] When asked if surgery made claimant's condition better under the assumption claimant was not limping before surgery, but was limping after surgery, Dr. Dickerson testified, "probably not."[10]

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[9] *Id*. at 19.

[10] *Id*. at 20.

Dr. Dickerson released claimant on October 7, 2014 and referred him to a physiatrist, Dr. Harris, whose records are not properly in evidence. Dr. Dickerson would defer to Dr. Harris regarding claimant's impairment or need for any work restrictions.

Dr. Stein testified claimant's surgery was not related to his injury by accident because there was no definitive physical diagnosis that would explain claimant's symptomatology. When questioned why he felt the disk herniation seen on the MRI was not the cause of claimant's pain, Dr. Stein testified:

> Well, let's see if I can count high enough. Number one, the distribution of his pain was way outside the area of an L5-S1 disk. The leg pain could have been if the disk was impinging on the nerve, but he was complaining of pain all the way up the back, between the shoulder blades, markedly outside the distribution of the S1 nerve root. Secondly, the disk on the MRI scan was not very definitive and not definitive the impinging on the nerve root and we gave him all of the benefit of the doubt with treatment. Thirdly, people who have not-defined symptoms almost always get worse with treatment. The epidural was terrible, it made him much worse. I have difficulty with that. Fourthly, the physical examination at least in my office was rife with symptom magnification and the psychological testing done by Dr. Moeller was quite consistent with that. And I guess we're on the fifth thing now, the discogram was certainly not diagnostic of any problem at L5-S1 causing all of this pain. Those are my reasons. To evaluate the current status, I would need a lot more information and I would have an awful lot of questions to ask.[11]

Dr. Stein testified claimant's impairment, as a result of the surgical fusion, increased to a 20% pursuant to the *Guides,* regardless of causation.

At respondent's request, claimant saw Chris Fevurly, M.D., who is board-certified in internal medicine and preventive medicine, on March 26, 2015. Claimant complained of low back pain, but his greater problem was his left leg, which tingled, burned and had a stabbing pain. According to claimant, his right leg symptoms completely resolved. Dr. Fevurly provided the following opinions:

> The work event on 1/11/12 resulted in contusion and sprain/strain of the thoracolumbar area and was the prevailing factor for the evaluation and treatment from the date of injury on 1/11/12 to the date of MMI on 9/15/12.
>
> The objective findings necessary to substantiate radiculopathy and vertebral segmental instability were never present in this presentation. There were multiple opinions of marked symptoms magnification vs. malingering in this presentation and in spite of this the claimant underwent the two level instrumented lumbar fusion which not surprisingly, has not benefitted his chronic pain complaints or his reported functionality.

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[11] Stein Depo. at 34-35.

> The work event resulted in a low back contusion and strain followed by delayed recovery leading to chronic low back pain with nonspecific lower extremity complaints. The ongoing pain complaints resulted from symptom magnification vs, malingering and resulted from non-physical factors to include psychosocial, behavioral and environmental issues.[12]

Dr. Fevurly testified there were inconsistencies in claimant's physical examination. It was Dr. Fevurly's opinion claimant has chronic low back pain and nonspecific lower extremity complaints. Dr. Fevurly testified claimant's "chronic pain complaints are the likely result of either marked symptom magnification or malingering."[13] Dr. Fevurly believed claimant's chronic low back pain was unrelated to his work accident and the degenerative changes in claimant's spine were the reason for the fusion surgery. In arriving at this opinion, Dr. Fevurly testified:

> Well, there's multiple reasons. Number one, I don't think that he really suffered any type of an anatomical structural change from the fall. I do think that he had degenerative changes in his lumbar spine. I think that when you look at all of the evaluating doctors, I think the general consensus was that there wasn't any evidence for radiculopathy or vertebral segmental instability prior to 2014 when he ended up pursuing surgery. He had a litany of different tests performed which did show some disc bulging and disc degeneration which likely pre-existed the work event. Nevertheless, I think it was unlikely that he would benefit from the surgery and indeed that was the case when Dr. Dicker[son] did that in April, 2014.[14]

Dr. Fevurly agreed with Dr. Stein that claimant was never a surgical candidate. Using the *Guides*, Dr. Fevurly determined claimant had a 5% whole body functional impairment. It was Dr. Fevurly's opinion claimant is not in need of additional medical treatment and requires no permanent work restrictions. Based on the fusion, which Dr. Fevurly opined was not related to claimant's injury by accident and instead due to claimant having preexisting degenerative arthritis, the doctor noted claimant should be limited to lifting 50 pounds occasionally and 35 pounds frequently, with avoidance of repetitive bending and stooping.

At his attorney's request, claimant saw Pedro Murati, M.D., who is board-certified in electrodiagnostic medicine, rehabilitation and physical medicine and certified as an independent medical examiner, on March 31, 2015. More than 95% of Dr. Murati's medicolegal consultations are on behalf of injured workers. Claimant complained of low back pain radiating down his left leg.

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[12] Fevurly Depo., Ex. 2 at 9.

[13] *Id*. at 15.

[14] *Id*. at 16-17.

Dr. Murati diagnosed claimant as having had a lumbar fusion, a 9th rib fracture and right SI joint dysfunction, all due to the work accident. Using the *Guides*, Dr. Murati found claimant sustained a 20% whole body functional impairment based on DRE Category IV. The doctor recommended at least yearly follow-ups on his low back, chronic pain management and medication, and noted antidepressant medication may help his pain. Dr. Murati deferred to Dr. Dickerson on whether surgery was appropriate. Dr. Murati gave claimant permanent restrictions of no lifting, carrying, pushing or pulling over 20 pounds occasionally or 10 pounds frequently; no bending, crouching, stooping or crawling; rarely climbing ladders/stairs or squatting; occasional driving; and to alternate sitting, standing or walking.

Because claimant is not presently asserting psychological impairment, this and the next paragraph are highly-summarized. At his attorney's request, claimant saw Molly Allen, Psy.D., a licensed psychologist, who diagnosed him with an adjustment disorder with anxiety and depressed mood and persistent depressive disorder, all directly traceable to the work-related injury and the resulting stress. Dr. Allen gave claimant a 16% impairment pursuant to the AMA *Guides*, 2nd Edition.

For respondent, Dr. Moeller saw claimant a second time on July 22, 2015. Dr. Moeller administered more psychological tests; claimant was less cooperative and refused to answer many test questions. The psychologist observed claimant's gait being better for the second evaluation and noted claimant reported less pain than at the initial evaluation. Based on claimant's scores, Dr. Moeller noted "malingering as a motivating factor for Mr. Langkiet is a probability that can't be ruled out."[15] Dr. Moeller diagnosed claimant with malingering, but he also stood by his initial opinion that claimant was "crying out for help."[16] He continued to find claimant's non-verbal pain behaviors to be genuine, but found claimant had no permanent psychological impairment or problems due to his work injury.

Claimant's separation of employment

Claimant attempted to perform accommodated work for respondent on May 7, 2012. Respondent bought a paper shredder specifically to accommodate claimant's restrictions. Claimant sorted paperwork and shredded documents. He testified that repeated bending to perform such work for about one hour and 45 minuues increased his back pain and he asked his field superintendent, Gail Ball, for medical treatment. According to claimant, Mr. Ball told him 30 minutes later that he could not speak to him because he had an attorney. Against the weight of the medical evidence, Mr. Ball testified claimant had only complained about his ribs before May 7, 2012, and never complained about his low back. Claimant went home.

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[15] Moeller Depo. at 32.

[16] *Id*. at 95.

Claimant worked sparingly for respondent, just three eight hour days in late-July, 2012, before returning on August 9, 2012. That day, claimant was tasked with filing papers and shredding documents. He was able to alternate positions as needed. Claimant testified the constant bending over, sitting down and standing up caused a burning sensation in his back and he could not "take it no more."[17] When questioned regarding the details surrounding his last day of work, claimant testified:

> Q. Okay. And you left voluntarily from work because you were in too much pain to continue working; correct?
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> A. No. They sent me home.
>
> Q. I thought you asked to go home.
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> A. It was both. Mary Ann in the office seen I was in pain. She told me if you need to leave, you can, and also, yes, I needed to go home.
>
> Q. But you asked to go home. You voluntarily left that day.
>
> . . .
>
> A. Okay. Mary Ann seen me and knew that I was in pain, and she offered for me, if I needed to go home, I could. And yes, I decided to go home. I was in pain.[18]

According to claimant, shortly after his last day worked, Mr. Ball told him over the phone that he was fired, but Mr. Ball would not explain why.

Claimant agreed he likely asked respondent to give him his job back on October 25, 2012.[19] He filed for unemployment benefits, apparently in late-2012. As such, he indicated he was ready, willing and able to work.

Mary Ann Myers, respondent's administrative assistant, received an email on January 16, 2013, regarding claimant's pursuit of unemployment benefits. She was asked to respond to several questions regarding claimant's employment status. In a January 21, 2013 email, Ms. Myers responded that respondent still employed claimant, he had not been terminated, there had not been a separation of employment and claimant had a pending workers compensation claim. Copies of her email went to Mr. Ball and Kent Wartick, one of respondent's division presidents.

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[17] P.H. Trans. (July 9, 2012) at 24.

[18] Cont. of R.H. Trans. at 30-31.

[19] *Id*. at 68.

On October 13, 2014, claimant went to respondent's office and reported he was willing to work. Russell Redding, respondent's Wichita business manager, gave claimant a letter stating that on such short notice, respondent did not have an available open position. On October 20, 2014, respondent sent a letter to its counsel advising accommodated work was not available for claimant, his prior position was filled when he was taken off work and no permanent positions were currently available for him.

When asked about his job status with respondent, claimant, testified, "I'm not really sure. I got told I was fired by Gail Ball, and I got a letter that they have no work for me, and then I got told I abandoned my job. So there's three different things. I'm not sure what happened."[20] Claimant stated respondent gave him two weeks paid vacation in 2014.

Mr. Ball denied having anything to do with the termination process, and further testified:

- claimant was terminated for not showing up to work and not doing his work,
- claimant was terminated at some indeterminate time in 2014,
- claimant asked respondent about returning to work in late-2014, apparently after he was terminated,
- respondent would have "theoretically" been able to provide claimant accommodated work if he was eligible for rehire.

Mr. Wartick testified claimant was terminated on November 4, 2014 for job abandonment when he failed to show or call in after his last day worked on August 9, 2012. Termination paperwork indicated claimant "left work without good cause" and abandoned his job.[21] Such understanding was based on what other people communicated to Mr. Wartick, not Mr. Wartick's personal knowledge. Claimant denied abandoning his job, contending he responsibly communicated with respondent via text messages. Mr. Wartick confirmed claimant's employment was not terminated in 2012 and respondent considered claimant its employee in 2013. Mr. Wartick indicated claimant was not terminated earlier because of an "[a]dministrative oversight" and his failing to "close the loop"[22] when he transferred from respondent's Wichita office in late-2012 to work for respondent in Texas. Mr. Wartick admitted claimant never received any write-ups or verbal notices regarding his job performance while working for respondent. Mr. Wartick testified a field superintendent, like Mr. Ball, would typically terminate a worker's employment.

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[20] *Id*. at 24.

[21] Wartick Depo., Ex. 4 at 2.

[22] *Id*. at 37.

Other than the termination paperwork dated November 4, 2014, Mr. Wartick could not produce any written documentation or evidence of verbal notices regarding claimant being disciplined in connection with his employment.

Mr. Wartick testified respondent has an aggressive return to work policy and tries to accommodate injured workers. He stated claimant would have been able to work 40 hours of accommodated work at $14.50 an hour in 2012, but typically without overtime pay. The work claimant performed minimally in 2012 – shredding and filing paperwork – is now performed by an administrative assistant. Mr. Wartick testified respondent currently would not likely employ claimant in a light-duty capacity because respondent's work force is underutilized.

PRINCIPLES OF LAW

An employer is liable to pay compensation to an employee incurring personal injury by accident arising out of and in the course of employment.[23] Claimant must prove the right to an award based on the whole record under a "more probably true than not true" standard.[24]

K.S.A. 2011 Supp. 44-510e(a) states in part:

> In case of whole body injury resulting in temporary or permanent partial general disability not covered by the schedule in K.S.A. 44-510d, and amendments thereto, the employee shall receive weekly compensation as determined in this subsection during the period of temporary or permanent partial general disability not exceeding a maximum of 415 weeks.
>
> . . .
>
> (2)(C) An employee may be eligible to receive permanent partial general disability compensation in excess of the percentage of functional impairment ("work disability") if:
>
> (i) The percentage of functional impairment determined to be caused solely by the injury exceeds 7½% to the body as a whole or the overall functional impairment is equal to or exceeds 10% to the body as a whole in cases where there is preexisting functional impairment; and
>
> (ii) the employee sustained a post-injury wage loss, as defined in subsection (a)(2)(E) of K.S.A. 44-510e, and amendments thereto, of at least 10% which is directly attributable to the work injury and not to other causes or factors.

[23] K.S.A. 2011 Supp. 44-501b(b).

[24] K.S.A. 2011 Supp. 44-501b(c) and K.S.A. 2011 Supp. 44-508(h).

In such cases, the extent of work disability is determined by averaging together the percentage of post-injury task loss demonstrated by the employee to be caused by the injury and the percentage of post-injury wage loss demonstrated by the employee to be caused by the injury.

(D) "Task loss" shall mean the percentage to which the employee, in the opinion of a licensed physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the five-year period preceding the injury. The permanent restrictions imposed by a licensed physician as a result of the work injury shall be used to determine those work tasks which the employee has lost the ability to perform. If the employee has preexisting permanent restrictions, any work tasks which the employee would have been deemed to have lost the ability to perform, had a task loss analysis been completed prior to the injury at issue, shall be excluded for the purposes of calculating the task loss which is directly attributable to the current injury.

(E) "Wage loss" shall mean the difference between the average weekly wage the employee was earning at the time of the injury and the average weekly wage the employee is capable of earning after the injury. The capability of a worker to earn post-injury wages shall be established based upon a consideration of all factors, including, but not limited to, the injured worker's age, physical capabilities, education and training, prior experience, and availability of jobs in the open labor market. The administrative law judge shall impute an appropriate post-injury average weekly wage based on such factors. Where the employee is engaged in post-injury employment for wages, there shall be a rebuttable presumption that the average weekly wage an injured worker is actually earning constitutes the post-injury average weekly wage that the employee is capable of earning. The presumption may be overcome by competent evidence.

(i) To establish post-injury wage loss, the employee must have the legal capacity to enter into a valid contract of employment. Wage loss caused by voluntary resignation or termination for cause shall in no way be construed to be caused by the injury.

(ii) The actual or projected weekly value of any employer-paid fringe benefits are to be included as part of the worker's post-injury average weekly wage and shall be added to the wage imputed by the administrative law judge pursuant to K.S.A. 44-510e(a)(2)(E), and amendments thereto.

(iii) The injured worker's refusal of accommodated employment within the worker's medical restrictions as established by the authorized treating physician and at a wage equal to 90% or more of the pre-injury average weekly wage shall result in a rebuttable presumption of no wage loss.

Regarding termination for cause, *Morales-Chavarin* holds:

> [T]he proper inquiry to make when examining whether good cause existed for a termination in a workers compensation case is whether the termination was reasonable, given all of the circumstances. Included within these circumstances to consider would be whether the claimant made a good faith effort to maintain his or her employment. Whether the employer exercised good faith would also be a consideration. In that regard, the primary focus should be to determine whether the employer's reason for termination is actually a subterfuge to avoid work disability payments.[25]

The term "for cause" is not defined in the Kansas Workers Compensation Act (the Act). What constitutes a termination "for cause" is subject to interpretation. The United States Supreme Court noted the term "cause" is a broad and general standard and that a more specific definition would be impracticable given the "infinite variety of factual situations [that] might reasonably justify dismissal for cause . . . ."[26] It appears the term "for cause" in our Act is not plain or unambiguous, but is broad, general and, according to the highest Court in the land, not practically subject to a precise definition.

In evaluating "cause," *Morales-Chavarin* discussed numerous Kansas cases and arrived at a standard of reasonableness based on all the circumstances, including the good faith of the parties. One of the cases discussed in *Morales-Chavarin* is *Decatur*,[27] in which the Kansas Supreme Court referenced the 10th Circuit's definition of the word "cause" in *Weir*,[28] which in turn states:

> [Cause for discharge] is a shortcoming in performance which is detrimental to the discipline or efficiency of the employer. Incompetency or inefficiency or some other cause within the control of the employee which prohibits him from properly completing his task is also included within the definition. A discharge for cause is one which is not arbitrary or capricious, nor is it unjustified or discriminatory.[29]

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[25] *Morales-Chavarin v. Nat'l Beef Packing Co.*, No. 95,261, 2006 WL 2265205 at *5 (unpublished Kansas Court of Appeals opinion filed Aug. 4, 2006), *rev. denied* 282 Kan. 790 (2006).

[26] *Arnett v. Kennedy*, 416 U.S. 134, 160-61, 94 S. Ct 1633, 40 L.Ed.2d 15 (1974), *overruled on other grounds by Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985).

[27] *Decatur County Feed Yard, Inc. v. Fahey*, 266 Kan. 999, 974 P.2d 569 (1999).

[28] *Weir v. Anaconda Co.*, 773 F.2d 1073 (10th Cir.1985).

[29] *Id.* at 1080. *Decatur*, while not clearly defining "cause," also touched on "reasonableness" and "good faith and fair dealing." *Decatur*, 266 Kan. at 1008 and 1010. The Board previously rejected the *Weir* definition of "cause" noted in *Decatur*. See *Brooks v. Baker's Apple Market*, No. 1,013,563, 2007 WL 4296011 (Kan. WCAB Nov. 28, 2007).

The *Weir* definition of "cause" focused on employee inefficiency, incompetency or other shortcoming and what is detrimental to the employer. The 10th Circuit's definition of "cause" was not adopted by the Kansas Supreme Court. Indeed, *Morales-Chavarin* merely states the Kansas Supreme Court "referred to" or mentioned the *Weir* definition.[30] *Morales-Chavarin* focuses on all of the factual circumstances, reasonableness, and the good faith of all parties, including whether there are attempts to manipulate the monetary result of a claim. Respondent carries the burden to prove it discharged claimant for cause.[31]

Based on K.S.A. 2011 Supp. 44-555c(a), the Board has exclusive jurisdiction to review all decisions, findings, orders and awards of a judge under the Kansas Workers Compensation Act. Board review of a judge's order is de novo on the record.[32] The definition of a de novo hearing is a decision of the matter anew, giving no deference to findings and conclusions previously made by the judge.[33] The Board, on de novo review, makes its own factual findings.[34] The Board often opts to give some deference – although not statutorily mandated – to a judge's credibility findings regarding a witness where the judge has the first-hand opportunity to do so.[35] The Board is as equally capable as a judge in reviewing evidence when a witness does not testify live in front of the judge.[36]

The determination of the existence, extent and duration of the injured worker's incapacity is left to the trier of fact.[37] It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony with the testimony of claimant and any other testimony relevant to the issue of disability. The trier of fact must make the ultimate decision as to the nature and extent of injury and is not bound by the medical evidence presented.[38]

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[30] *Morales-Chavarin*, 2006 WL 2265205 at *5.

[31] See *Gutierrez v. Dold Foods, Inc.*, 40 Kan. App. 2d 1135, 1144, 199 P.3d 798 (2009) ("If a good-faith requirement were to exist, . . . surely the employer would have the burden to demonstrate the worker's failure to make a good-faith effort.").

[32] See *Helms v. Pendergast*, 21 Kan. App. 2d 303, 899 P.2d 501 (1995).

[33] See *In re Tax Appeal of Colorado Interstate Gas Co.*, 270 Kan. 303, 14 P.3d 1099 (2000).

[34] See *Berberich v. U.S.D. 609 S.E. Ks. Reg'l Educ. Ctr.*, No. 97,463, 2007 WL 3341766 (Kansas Court of Appeals unpublished opinion filed Nov. 9, 2007).

[35] See *King v. Sealy Corp.*, No. 1,059,645, 2016 WL 858309 (Kan. WCAB Feb. 23, 2016).

[36] See *Moore v. Venture Corp.*, 51 Kan. App. 2d 132, 142, 343 P.3d 114 (2015).

[37] *Boyd v. Yellow Freight Systems, Inc.*, 214 Kan. 797, 522 P.2d 395 (1974).

[38] *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

ANALYSIS

Due to claimant's reasonably necessary lumbar fusion, his functional impairment is 20% to the body as a whole. Claimant did not abandon his job and he was not terminated for cause. He sustained a 66.25% work disability.

The Board agrees with the judge's ruling that claimant's low back surgery was reasonably necessitated by his accidental work injury. As a result, he sustained a 20% functional impairment to the body as a whole.

Respondent has various arguments that claimant's low back surgery was not due to his injury by accident.

As posited by respondent, Dr. Dickerson incorrectly related claimant's surgery to his injury by accident because claimant's MRI studies, as interpreted by radiologists, did not show herniated discs or significant stenosis, the EMG/NCT was negative and the discogram was negative. However, Dr. Dickerson interpreted the MRIs as showing herniated discs and significant stenosis. His opinion varied from that of the radiologists, but that does not mean his opinion is wrong. Relying instead on his clinical examination of claimant, Dr. Dickerson discounted the other tests. The doctor further visually confirmed the injuries to claimant's low back when he operated on him. Dr. Do confirmed claimant had nerve compression, a positive straight leg raise test and agreed with Dr. Dickerson that claimant needed surgery, even though the type of surgery Dr. Dickerson performed was ultimately different than what was initially proposed.

We afford less weight to the conclusions of Drs. Stein and Fevurly. Dr. Stein initially noted claimant's pathology was consistent with the distribution of his symptoms. It appears Dr. Moeller's involvement had a significant impact on Dr. Stein's view of claimant. Dr. Stein latched on to the "malingering" label, while not following along with Dr. Moeller's statement that claimant was a "genuine pain patient attempting to emphasize his symptoms and distress to his care providers as opposed to a conscious attempt to deceive." The record also contains no showing that Dr. Stein knew about or reviewed Dr. Dickerson's recommendation for surgery.

Unlike Drs. Dickerson, Stein and Do, Dr. Fevurly is not a surgeon. The Board does not share Dr. Fevurly's opinion that claimant had a mere lumbar contusion and strain and needed surgery due to preexisting degenerative disc disease. We place more weight in the opinions of Drs. Dickerson and Do, as did the judge.

Further, respondent argues claimant never needed surgery because he is worse now than before. Whether surgery is reasonably needed is a different question than whether surgery was successful. Further, whether the best result is met is not the proper

litmus test. Finally, the premise that claimant is worse now than before is dubious. While claimant was not limping on the June 8, 2012 surveillance video, medical experts documented that he was limping both before and after that date and prior to his surgery. There is also ample evidence that surgery benefitted claimant. He testified about improvement in his right leg and low back, as confirmed by Dr. Dickerson's records. While claimant developed some left thigh symptoms about 10 days after surgery, Dr. Dickerson did not view such symptoms as due to the surgery. Even if the symptoms were related to the surgery, the fusion was still reasonably necessary to decompress claimant's spinal lesion and alleviate his right leg radiculopathy.

Additionally, claimant was not terminated for cause and he did not abandon his job. The evidence is certainly conflicting and our decision is made by a thin margin. Nonetheless, the Board agrees with the judge that the greater weight of the evidence, when considering all of the circumstances, facts, good faith and reasonableness of the parties, does not establish claimant's wage loss is due to a voluntary resignation or termination for cause.

Claimant denied "voluntarily" leaving work, contending he was in pain and had permission from an administrative assistant to go home on August 9, 2012. Claimant last worked for respondent two years prior to his medically-required surgery, so he understandably was in what the judge described as significant pain. Claimant testified Mr. Ball discharged him from respondent's employment shortly thereafter. Claimant's admission that he returned to respondent on October 25, 2012, to ask for his job back, is certainly some evidence that his employment had ended prior to such time, at least in his mind.

Nevertheless, the evidence that claimant's employment was terminated in 2012, for cause or not, is wholly undermined by evidence coming from respondent. First, it is unknown who with respondent would have terminated claimant's employment at that time. Claimant said Mr. Ball fired him, but Mr. Ball denied having anything to do with claimant's termination. Mr. Ball indicated claimant's employment ended in 2014. Ms. Myers indicated in a January 21, 2013 email that claimant's employment had not been terminated and he was still respondent's employee. Mr. Wartick noted claimant's employment was not terminated in 2012 and he was still respondent's employee in 2013. Indeed, claimant's employment with respondent ended on November 4, 2014, after claimant reported to work in October 2014 following his release from Dr. Dickerson's treatment. Claimant was not offered his job back because respondent had no available work. As noted by the judge, neither letter respondent wrote in October 2014 contained any mention of claimant abandoning his job or having been terminated for cause.

The parties stipulated that if claimant's low back surgery was reasonably necessary to cure and relieve the effects of his work injury, the judge's computation of a 66.25% work disability was proper. The Board accepts the stipulation and affirms the 66.25% work disability award.

CONCLUSIONS

The judge's Award is affirmed. Claimant's lumbar fusion surgery was reasonably necessary to cure and relieve the effects of his injury by accident. As a result of his injury by accident, claimant sustained a 20% functional impairment to the body as a whole and a 66.25% work disability. Claimant's employment was not terminated for cause and he did not voluntarily resign his job.

AWARD

WHEREFORE, the Board affirms the March 4, 2016 Award.

IT IS SO ORDERED.

Dated this _____ day of June, 2016.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

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Honorable Ali Marchant